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No. **602**

**In The
Supreme Court of the United States**

OCTOBER TERM, 1941

STATE OF ALABAMA, Petitioner

vs.

**KING AND BOOZER, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, and UNITED
STATES OF AMERICA.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA.**

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STATE OF ALABAMA, Petitioner

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**KING AND BOOZER, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, and UNITED
STATES OF AMERICA.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA.**

The State of Alabama prays that a writ of certiorari issue to review the decree of the Supreme Court of Alabama rendered in the above case on July 29, 1941 (R. folio 147), reversing and rendering the decree of the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 133).

OPINIONS BELOW

The opinion of the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 133), is not reported.

The opinion of the Supreme Court of Alabama (R. folio 149-164) has not been officially reported, but such opinion and the dissenting opinion therein may be found in 3 So. (2d) 572.

JURISDICTIONAL STATEMENT

The final decree of the Supreme Court of Alabama sought to be reviewed was entered on July 29, 1941 (R. folio 147). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decree below sustained a right or immunity claimed by the respondents under the Constitution of the United States.

The issue in this case is whether the respondent, King and Boozer, is taxable under the provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16) with respect to retail sales of tangible personal property made to a contractor purchasing the same under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States. The sustaining of the claim for such immunity by the Court below plainly presents a Federal question reviewable under Section 237 (b) of the Judicial Code. *Federal Land Bank v. Priddy*, 295 U. S. 229; *Pittman v. Home Owners' Corp.*, 308 U. S. 21; *The Federal Land Bank of St. Paul v. Bismarck Lumber Company*, No. 1035, October Term 1940.

The Federal questions were specially set up and claimed by the respondent, King and Boozer, in its

protest to the assessment involved (R. folio 4); in its petition or bill filed in the trial Court (R. folio 33); by the United States in its petition of intervention (R. folio 21, 23); in the assignments of error by respondents as appellants in the Court below (R. folio 141); and were briefed and argued before the Court below. The grounds upon which it is contended that the questions are substantial are set forth in the Reasons for Granting the Writ, *infra*.

QUESTIONS PRESENTED

1. Whether the assessment of a tax under the Alabama Sales Tax Act with respect to sales of tangible personal property to contractors purchasing the same pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is repugnant to the Constitution of the United States.

2. Whether the United States, by the terms of such contract, validly consented to the payment of such tax by the contractors and to the reimbursement thereof as a part of the cost of construction.

STATUTES INVOLVED

The pertinent provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16), and of the statute under which the appeal was taken from the assessment (General Acts of Alabama, Extra Session, 1936, page 172), and of the Acts of Congress (Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess., c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508), are printed in the Appendix, *infra*.

STATEMENT

This petition is filed to review a decree of the Supreme Court of Alabama rendered on July 29, 1941, (R. folio 147) in which it held invalid an assessment of sales taxes made by the State of Alabama under the provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, page 16) against the respondent, King and Boozer, a lumber dealer at Anniston, Alabama, with respect to lumber sold by said respondent to Dunn Construction Company, Inc., and John S. Hodgson and Company, contractors, purchasing such lumber under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States for use in the construction of a complete tent camp at the military reservation known as Fort McClellan in the State of Alabama. In the majority opinion of the Court it was held that the sales involved were immune from State taxation under the Constitution of the United States; that the contractors were instrumentalities of the United States; and that the United States had not consented to the tax or to the payment thereof by the contractors as a part of the cost of the construction. (R. folio 149-163). A dissenting opinion was rendered by one of the Justices. (R. folio 164).

The contract was executed on September 9, 1940, under the authority of Acts of Congress, namely, the Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess., c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508. (R. folio 54).

The sales involved were made by respondent, King and Boozer, to the contractors, who purchased in their own names and upon their own credit. (R. folio 48 and 81). After delivery of the goods to the contractors and the payment therefor by the contractors with their own funds (R. folio 49), they received reimbursement therefor from the United States. (R. folio 50). The invoice rendered the contractors did not include the sales taxes; however, the seller later rendered the contractors a statement for the tax, but which was not paid. (R. folio 51).

The essence of said contract is that the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp * * * * " at Fort McClellan in the State of Alabama in "accordance with the drawings and specifications or instructions contained in appendix 'A' hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions" (R. folio 55); and were to receive from the United States in consideration for their undertaking under the contract the following:

"(a) Reimbursement for expenditures as provided in Article II.

"(b) Rental for Contractor's equipment as provided in Article II.

"(c) A fixed fee in the amount of One Hundred Twenty-eight Thousand Eight Hundred Sixty-five Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses." (R. folio 56).

The total estimated cost of the construction, exclusive of the contractors' fee, was "THREE MILLION TWO HUNDRED FOUR THOUSAND AND FIVE HUNDRED EIGHTY-EIGHT DOLLARS (\$3,204,588.00)," as stated in Article I (R. folio 55).

Article II of the contract, among other things, provides as follows:

"Cost of the work.

"REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

"1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer and as are included in the following items:

"(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of

machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government." (R. folio 58)

"(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor." (R. folio 59)

Other expenditures itemized in Article II are not involved in this case.

Paragraph 3 of Article I of the contract contained the following provision with respect to title to materials purchased by the contractors, viz:

"3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall

not operate to relieve the Contractor from any duties imposed under the terms of this contract.”
(R. folio 56)

Article V of the contract under the head of “Special Requirements” contains, among other provisions, the following:

“1. The contractor hereby agrees that he will:”

“(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.”

“(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of \$500 shall be made or placed without prior approval of the Contracting Officer.” (R. folio 64)

The purchase orders, as shown by copy of a typical purchase order (R. folio 81, 82), after having been approved by the Constructing Quartermaster, were given by the contractors to the respondent, King and Boozer. Said purchase orders contained the following shipping instructions:

"Ship To: UNITED STATES CONSTRUCTION QUARTERMASTER

At: For McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co." (R. folio 81)

The following, among other statements, were endorsed on the purchase orders:

"This order is placed for the benefit of, and is assignable to, the UNITED STATES GOVERNMENT.

"This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. folio 81)

The following, among other instructions, were endorsed on each purchase order:

"2. IMMEDIATELY upon shipment mail to DUNN CONSTRUCTION CO., INC., and JOHN S. HODGSON & CO., at Fort McClellan, Ala.:

"A. ORIGINAL and TWO (2) copies of Bill of Lading, (or shipping papers.

"BILLS OF LADING, etc., MUST READ
UNITED STATES CONSTRUCTION QUARTER-
MASTER AT FORT McCLELLAN, ALA.

Account of DUNN CONSTRUCTION CO., INC.,
and JOHN S. HODGSON & COMPANY
and must also bear PURCHASE ORDER
NUMBER

"B. Six (6) copies of invoice, properly filled
and certified as follows:

"I certify that the above bill is correct and just;
that payment therefor has not been received;
and that except as noted below or otherwise in-
dicated herein all unmanufactured articles,
materials, or supplies furnished under this in-
voice have been mined or produced in the Unit-
ed States substantially all from articles, ma-
terials, or supplies mined, produced, or manu-
factured, as the case may be, in the United
States; and that State or local sales taxes are
not included in the amount billed." (R. folio 82)

The record showed that in placing orders for ma-
terials, shipping and making delivery thereof, and
in obtaining reimbursement therefor, the contractors
were required to comply with various detailed rules,

regulations or instructions of the United States or the Contracting Officer or his agent, the Constructing Quartermaster, but, for the purposes of this petition, it is not deemed necessary to set forth in more detail the facts relating to such circumstances and incidents. (R. folio 90-125)

Under the provisions of the Alabama Sales Tax Act, the assessment was made against the respondent, King and Boozer, covering the period beginning January 1, 1941, and ending March 31, 1941, in the amount of \$1,372.75 (R. folio 13, 14), being an amount equal to two per cent (2%) of the gross proceeds of the sales (Section II of said Act); the amount of which tax the seller was required to add to the sales price and collect from the purchaser (Section XXVI), and a violation of the provisions of Section XXVI is made a misdemeanor (Section XXVII). The respondent, King and Boozer, executed a bond for the tax, and duly perfected an appeal from the assessment to the Circuit Court of Montgomery County, Alabama, in Equity. (R. folio 7, 8)

The United States of America intervened in said cause for the purpose of attacking the validity of said assessment and the statute under which such assessment was made. (R. folio 21, 23)

The trial Court upheld the validity of the assessment, (R. folio 133-135) from which an appeal was taken by the respondent and the intervener to the Supreme Court of Alabama. (R. folio 135)

In the trial of said cause in the Circuit Court and on appeal in the Supreme Court of Alabama, the respondent, King and Boozer, and the intervener, the United States of America, contended that the purchases made by said contractors constituted purchases "made by or on behalf of the United States or by an instrumentality or agency of the United States," and were, therefore, constitutionally immune from State taxation, and that the United States had not consented to the imposition of such tax.

The State of Alabama contended that the tax as imposed upon the respondent, King and Boozer, and which was required by said Act to be passed on by the seller to the purchaser, was valid; that said Sales Tax Act was valid; that as said sales were made by the respondent to said contractors (a private corporation and a partnership composed of individuals, both engaged in business for private profit), acting in their own names, upon their own credit, and payment for which was made with their own funds, before any reimbursement therefor from the United States under said contract, the same constituted taxable transactions and were not immune from such a nondiscriminatory State tax; that such purchases were not made by an instrumentality or agency of the United States entitled to assert Federal immunity from State taxation; and that the United States waived any immunity from such tax or with respect to the burden thereof in this: that by the terms of said contract, the contractors were required to pay all applicable sales taxes which might be incurred by them in the purchase of materials,

the payment of which taxes constituted a reimbursable expenditure under said contract.

On July 29, 1941, the Court below rendered its final decision, one Justice dissenting, reversing the decree of the trial Court and rendering a decree in favor of the respondents and against the petitioner. (R. folio 149-165)

This case was presented to the Supreme Court of Alabama as a companion case to the case of *United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company, partners doing business as Dunn Construction Company, Inc., and John S. Hodgson and Company, Appellants vs. John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, Appellee*, 3 So. (2d) 582, involving the validity of an assessment of use taxes made under the provisions of the Alabama Use Act (General Acts of Alabama, Regular Session, 1939, page 96), and in which case the Supreme Court of Alabama rendered a decision on July 29, 1941, reversing and rendering the decree of the trial Court, upon the authority of the ruling in the case at bar, and in which companion case a like petition for writ of certiorari is being filed with this Court.

REASONS FOR GRANTING THE WRIT

The writ should be granted for the following separate and several reasons:

1. The decision of the Court below that sales of tangible personal property to contractors purchasing

the same pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States are immune under the Constitution of the United States from such a nondiscriminatory sales tax imposed by the State, for the reason that the State is prohibited from imposing "any tax upon the transactions by which the United States secures the things desired for its governmental purposes," was based upon the cases of *Pannhandle Oil Co. v. Mississippi, ex rel. Knox*, 277 U. S. 218, and *Graves v. Texas Co.*, 298 U. S. 393. These cases have been distinguished and expressly limited to a tax upon direct sales to the United States or an instrumentality thereof. *Liggett & Myers Tobacco Co. v. United States*, 299 U. S. 383; *Wheeler Lumber Bridge and Supply Co. v. United States*, 281 U. S. 572; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. v. Tax Commission*, 302 U. S. 186; *Trinityfarms Construction Co. v. Grosjean*, 291 U. S. 466. The Court clearly erred in applying the holding of the *Panhandle* and *Graves* cases to sales to a contractor.

2. The power of the State to impose a nondiscriminatory sales tax upon a contractor purchasing materials pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is not dependent upon consent of Congress. However, such form of contract, and particularly the tax provision therein (Article II (m)), was considered by Congress on June 4, 1940 (Congressional Record, 76th Congress, 3d Session, Volume 86, Part 7, pp. 7518, 7527-7539), when it rejected proposals to change such provision or the status of the contractors in purchasing materials under such contract; and,

thereafter, in the Act of July 2, 1940 (Public No. 703), under which the construction at Fort McClellan, Alabama, was authorized, Congress expressly authorized the Secretary of War to use "the cost-plus-a-fixed-fee form of contract" (Section 1, Public, No. 703, Appendix, *infra*). Notwithstanding such express approval of the form of contract and the delegation of authority to the Secretary of War to execute the same, as we read the decision, the Court held there was no congressional consent to the imposition of the tax, or the payment thereof as a part of the "Cost of the Work" (Article II (m)); and that if the provision in Article II (m) of the contract was intended as a waiver of any tax immunity, the officer executing the contract (the Secretary of War) lacked the power or authority to do so; and, as interpreted by the Court, the provision was rendered meaningless. This was clearly erroneous.

3. Although the Court failed to designate the status of the contractors, it, in effect, construed them to be instrumentalities of the United States, entitled to constitutional immunity from State taxation. As the contractors were operating for private profit, the decision on this point was clearly erroneous. *Baltimore Ship Bldg. & Dry Dock v. Baltimore*, 195 U. S. 375; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514;; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Standard Oil Company v. Lee*, 199 So. 325; *Federal Compress Co. v. McLean*, 291 U. S. 17; *Kreipke v. Commissioner of Internal Revenue*, 32 Fed. (2d) 594; *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319; *Brooklyn Ash Removal Co., Inc. v.*

United States, 80 Ct. Cls. 770, cer. den. 295 U. S. 752; *Helvering v. Claiborne-Annapolis Ferry Co.*, 93 Fed. (2d) 875.

4. The decision of the Court below is directly in conflict with the decision of the Supreme Court of Florida, the highest Court of such State, in the case of *Sandard Oil Company v. Lee*, 199 So. 325, where the same form of contract and the same Federal questions were involved. Such conflict has been held to constitute a ground for granting a writ of certiorari. *Pagel v. MacLean*, 283 U. S. 266; *Singleton v. Cheek*, 284 U. S. 493; *Spicer v. Smith*, 288 U. S. 430; *Trotter v. State of Tennessee*, 290 U. S. 354; *Pagel v. Pagel*, 291 U. S. 473; *Connell v. Walker*, 291 U. S. 1; *Gilvary v. Cuyahoga Valley Ry. Co.* 292 U. S. 57.

5. The decision of the Court below involves the construction of a form of contract expressly authorized by Congress for general use in connection with the National Defense Program involving the expenditures of billions of dollars. A decision of this Court is necessary to settle conflicting interpretations by the Courts and administrative authorities of such form of contract, to determine the Constitutional questions involved as affecting the taxing power of the States, the immunity of the Federal Government, and the doctrine of intergovernmental tax immunity.

CONCLUSION

The decision sought to be reviewed involves questions of vital concern to the Federal Government and the several States. It is, therefore, respectfully submitted that this petition for writ of certiorari should be granted.

✓ **THOMAS S. LAWSON,**
Attorney General of Alabama

✓ **JOHN W. LAPSLEY,**
Assistant Attorney General

✓ **J. EDWARD THORNTON,**
Assistant Attorney General

GARDNER F. GOODWYN, JR.,
of Counsel.

APPENDIX

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 18:

Section 1. DEFINITIONS. The following words, terms and phrases, when used in this Act, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning: (a). The term "person" or the term "company" herein used interchangeably, includes any individual, firm, co-partnership, association, corporation, receiver, trustee or any other group or combination acting as a unit and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. (b). The term "department" means the Department of Revenue of the State of Alabama. (c). The term "Commissioner" means the Commissioner of Revenue of the State of Alabama. (d). The term "tax year" or "taxable year" means the calendar year. (e). The term "sale" or "sales" includes installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale. (f). The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property (and including the proceeds from the sale of any property handled on consignment by the taxpayer), including merchandise of any kind and character without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever, and without any deductions on account

of losses; provided that cash discounts allowed and taken on sales shall not be included, and "gross proceeds of sales" shall not include the sale price of property returned by customers when the full sales price thereof is refunded either in cash or by credit. (g). The word "taxpayer" means any person liable for taxes hereunder. (h). The term "gross receipts" means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character, all receipts actual and accrued, by reason of any business engaged in, (not including, however, interest, discounts, rentals of real estate or royalties) and without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever and without any deductions on account of losses. (i). The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers, not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient or component part of the tangible personal property or products which he manufactures or compounds for sale, and the furnished container and label thereof. (j). The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as wholesales. The quantities of goods sold or prices at which sold, are immaterial in determining whether

or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. (k). The word "business", as used in this Act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls.

Section II. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a). Upon every person, firm or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, (not including, however, bonds or other evidences of debt or stocks), an amount equal to two per cent (2%) of the gross proceeds of

sales of the business except where a different amount is expressly provided herein. Provided, however, that any person engaging or continuing in business as a retailer and wholesaler or jobber shall pay the tax required on the gross of retail sales of such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business, and when his books are not so kept he shall pay the tax as a retailer, on the gross sales of the business. (b). Upon every person, firm or corporation engaged, or continuing within this State, in the business of conducting, or operating, places of amusement and/or entertainment, billiard and pool rooms, bowling alleys, amusement devices, musical devices, theaters, opera houses, moving picture shows, vaudeville, amusement parks, athletic contests, including wrestling matches, prize fights, boxing and wrestling exhibitions, football and baseball games, (including athletic contests conducted by or under the auspices of any educational institution within this state, or any athletic association thereof, or other association whether such institution or association be a denominational, a state, a county, or a municipal institution or association or a state, county, or city school, or other institution, association or school), skating rinks, race tracks, golf courses, or any other place at which any exhibition, display, amusement or entertainment is offered to the public or place or places where an admission fee is charged, including public bathing places, public dance halls of every kind and description within the State of Alabama, an amount equal to two per cent (2%) of the gross receipts of any such business. (c). Upon every person, firm or corporation engaged or

continuing within this State in the business of selling any automotive vehicle, an amount equal to one-half of one-per cent of the gross proceeds of the sale of said automotive vehicle.

Section V. EXEMPTIONS: There are however exempted from the provisions of this act and from the computation of the amount of the tax levied, assessed or payable under this Act the following: (a). The gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. (b). The gross proceeds of sales of tangible personal property to the State of Alabama to the counties within the State, and to incorporated municipalities of the State of Alabama. *****

Section VI. The taxes levied under the provisions of this Act, except as otherwise provided, shall be due and payable in monthly installments on or before the 20th day of the month next succeeding the month in which the tax accrues. On or before the 20th day of each month after this act shall have taken effect, every person on whom the taxes levied by this Act are imposed, shall render to the State Department of Revenue on a form prescribed by the Department, a true and correct statement showing the gross sales, the gross proceeds of sales, or gross receipts of his business, as the case may be, for the next preceding month, the amount of gross proceeds or gross receipts which are not subject to the tax, or are not to be used as a measurement of the taxes due by such

person, and the nature thereof, together with such other information as the Department may demand and require, and at the time of making such monthly report such person shall compute the taxes due and shall pay to the State Department of Revenue the amount of taxes shown to be due. Provided, however, that when the total tax for which any person liable under this Act does not exceed ten (10) dollars, for any month, a quarterly return and remittance in lieu of the monthly returns may be made on or before the 20th day of the month next succeeding the end of the quarter for which the tax is due, when specially authorized by the Department of Revenue, and under such rules and regulations as may be prescribed. The Department of Revenue, for good cause, may extend the time for making any return required under the provisions of this act, but the time for filing any such return shall not be extended for a period greater than thirty days from the date such return is due to be made.

Section VII. Any person taxable under this Act, having cash and credit sales, may report such cash sales, and the taxpayer shall thereafter include in each monthly report all credit collections made during the month preceding, and shall pay the taxes due thereon at the time of filing such report, but in no event shall the gross proceeds of credit sales be included in the measure of the tax to be paid until collection of such credit sales shall have been made.

Section XI. Any person subject to the provisions of this Act who shall fail to make the reports or any of them, as herein required, or who shall fail to keep

the records as herein required, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars, for each offense. Each month of such failure shall constitute a separate offense.

Section XII. Any person subject to the provisions of this Act wilfully refusing to make the reports herein required, or who shall refuse to permit the examination of his records by the State Department of Revenue, or its duly authorized agents, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty (\$50.00) dollars, nor more than five hundred (\$500.00) dollars for each offense, and in addition may be imprisoned in the county jail for a period not to exceed six months. Each month of failure to make such reports shall constitute a separate offense, and each refusal of a written demand of the Department to examine, inspect or audit such records shall constitute a separate offense.

Section XIII. As soon as practicable after the return is filed the Department shall examine it and ascertain the proper amount of the tax due as shown by the return. If the amount paid is greater than the amount due, as shown by the return, the excess shall be refunded to the taxpayer, or credited on any deficiency previously due by the taxpayer, in accordance with law and under such rules and regulations as the Department may adopt and promulgate. If the amount paid is less than the amount due, as shown by the return, the Department shall

immediately notify the taxpayer of such deficiency and shall add thereto a penalty of ten (10%) per cent of the amount due, and if such deficiency be not paid within thirty days from the date of such notice, the same shall bear interest at the rate of one-half of one ($\frac{1}{2}$ of 1%) per cent per month, or fraction thereof, from the date the same was due which shall be collected as a part of the tax.

Section XIV. Any person who fails to pay the tax herein levied within the time required by this Act shall pay, in addition to the tax, a penalty of ten (10%) per cent of the amount of tax due, together with interest thereon at the rate of one-half of one ($\frac{1}{2}$ of 1%) per cent per month, or fraction thereof, from the date at which the tax herein levied became due and payable, such penalty and interest to be assessed and collected as a part of the tax.

Section XVI. Whenever the Department, in examining and auditing the records of any taxpayer, or from other information, shall ascertain that the amount, or amounts, previously paid by any taxpayer for any period, or periods, is incorrect, the Department shall compute the correct amount of tax due, and if it appears that the amount paid by the taxpayer is in excess of the correct amount due, such excess shall be refunded to the taxpayer in accordance with law and under the rules and regulations of the Department. If it appears that the amount paid by such taxpayer is less than the amount due, the Department shall compute the amount of such deficiency and shall notify the taxpayer, and shall demand payment therefor, and if not paid within ten

(10) days from the date of such demand, the Department shall make an assessment against the taxpayer of the amount due and shall add a penalty of one-half of one ($1\frac{1}{2}$ of 1%) per cent per month from the date such taxes, or any part thereof became due. Provided that if the Department be of the opinion that there was a wilful or fraudulent intent by the taxpayer to evade the tax due, it may assess a penalty of twenty-five (25%) per cent of the tax. Provided that upon appeal such action shall be reviewable.

Section XVII. Whenever the Department shall make an assessment against a taxpayer as herein provided, the Department shall notify the taxpayer by registered mail of the amount of such assessment, and shall notify the taxpayer to appear before the Department on a day named not less than twenty (20) days from date of such notice and show cause why such assessment should not be made final. Such appearance may be made by agent or attorney. If no showing is made on or before the date fixed in such notice, or if such showing is not sufficient in the judgement of the Department, such assessment shall be made final in the amount originally fixed or in such other amount as is determined by the Department to be correct. If upon such hearing the Department finds the amount due to be different from that originally assessed, it shall make the assessment final in the correct amount and in all cases shall notify the taxpayer of the assessment as finally fixed. Provided a notice by United States mail addressed to the taxpayer's last known place of business shall be sufficient. Any assessment made by the Department shall prima facie be correct upon appeal.

Section XVIII. Whenever any taxpayer, who has duly appeared and protested an assessment by the Department, is dissatisfied with the assessment as finally made, he may appeal in all respects in the same manner provided by Act. No. 154, approved April 21, 1936 (Act Sp. Session 1936 P. 172), except that such appeal shall be made within fifteen (15) days from the date said assessment becomes final. Provided no appeal shall lie in cases where the taxpayer has failed to appear and protest.

Section XIX. The tax together with interest and penalties imposed by this act shall be a lien upon the property of any person subject to the provisions of this act, and the provisions of the Revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section XXVI. It shall be unlawful for any person, firm, corporation, association or copartnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same.

Section XXVII. Any person, firm, or corporation violating any of the provisions of Section 26 of

this Act shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than Fifty (\$50.00) Dollars nor more than One Hundred (\$100.00) Dollars, or may be imprisoned in the county jail for not more than six months, or by both such fine and imprisonment, and each act in violation of the provisions of this Act shall constitute a separate offense.

Section XXVIII. Any taxpayer who shall violate any of the provisions of this act may be restrained from continuing in business, and the proper prosecution shall be instituted in the name of the State of Alabama by its Attorney General, by the counsel of the Department or under their direction by any Circuit Solicitor of the State until such person shall have complied with the provisions of this act.

Section XXIX. The tax imposed by this act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this act otherwise specifically provided.

Section XXXI. The administration of this act is vested in and shall be exercised by the State Department of Revenue except as otherwise herein provided, and the enforcement of any of the provisions of this act in any of the courts of the state shall be

under the jurisdiction and supervision of the Department, and the Department may require the assistance of, and act through the prosecuting attorney, or deputy solicitor of any county, or any circuit solicitor, and the Attorney General of the State, and and legal counsel of the State Department of Revenue. The Department shall appoint as needed such agents, clerks, and stenographers as may be necessary to enforce provisions of this act who shall serve at the will of the Commissioner of the Department, and who shall perform such duties as may be required, and such duly appointed and qualified agents are authorized to act for the Department as it may direct and as is authorized by law. Each such agent shall execute a bond in the sum of five thousand (\$5,000.00) dollars for the faithful performance of his duties.

Section XXXII. The Department shall from time to time promulgate such rules and regulations for making returns and for ascertainment, assessment and collection of the tax imposed hereunder as it may deem necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations.

Section XXXVI. The Governor may, by executive order, authorize the Department to provide, by proper rules and regulations, for the allowance of a discount, not to exceed three per cent (3%) of the taxes levied by this Act and due and payable to the State by any person licensed under the provisions hereof. Provided, however, that no discount shall be authorized or allowed upon any taxes which are not paid before delinquency as in this Act provided.

Section XXXIX. That the provisions of this Act are severable and if any section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, word or words of this Act shall be held to be unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the same shall not affect or impair any of the remaining provisions, sections, paragraphs, sentences, clauses, phrases and, or words of this Act. It is hereby declared to be the legislative intent that this Act and each section, paragraph, sentence, clause, phrase or word thereof would have been enacted had such unconstitutional section, or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, and word or words not been included herein.

General and Local Acts of Alabama, Extra Session 1936, Act No. 154:

SEC. 1. That Section 103, Article 4 of an act entitled "To provide for the general revenue of the State of Alabama," approved July 10, 1935, be and the same is hereby amended to read as follows: Section 103. Either the State or the taxpayer may appeal from any final assessment made by the State Tax Commission* under any assessment required by law to be made by the State Tax

*The name of the State Tax Commission was changed to "State Department of Revenue" by Act No. 4, approved February 1, 1939 (General Acts of Alabama, Regular Session and Special Session, 1939, pp 1 and 2).

Commission. If the appeal is by the State such appeal shall be made by the Attorney General filing the written notice with the Secretary of the State Tax Commission, and with the Register of the Circuit of Montgomery County in Equity, within thirty days after such assessment is made final. The State Tax Commission shall immediately give notice by registered mail to the taxpayer of the filing of such appeal by the State. If any taxpayer against whom an assessment is made by the State Tax Commission under any assessment required by law to be made by the State Tax Commission, is dissatisfied with the final assessment as fixed by the said State Tax Commission, he may appeal from said final assessment to the Circuit Court of Montgomery County sitting in Equity, or, in cases other than public utilities, to the Circuit Court of the County in which the taxpayer resides if the taxpayer has within the State a permanent residence, at the option of the taxpayer, by filing notice of appeal with the Secretary of the State Tax Commission and with the Register of the Circuit Court of the county to which the appeal shall be taken within thirty days from the date of said final assessment made and entered on the minutes of the Commission as required by law, and in addition thereto by giving bond conditioned to pay all costs to be filed with and approved by the Register of the Court to which the appeal shall be taken. The taxpayer shall pay the assessment so made before the

same shall become delinquent and if such taxes are not paid before the same become delinquent, the Court shall upon motion ex mero motu dismiss such appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the Register of the Court to which the appeal shall be taken in double the amount of the taxes payable to the State of Alabama, conditioned to pay all taxes, interest, and costs due the State, County, or any Agency or Sub-division thereof. In such appeals the party taking the appeal shall be styled the appellant and the party against whom the appeal is taken shall be styled the appellee. The assessment made by the State Tax Commission shall prima facie be correct, and where the appeal is taken by the taxpayer the burden shall be on the appellant to show that such assessment is incorrect. The Circuit Court in Equity, or the Supreme Court of Alabama on appeal to it may, if it be of the opinion from all the evidence that the assessment is made is either too high or too low, fix the amount of such assessment. The Court shall hear such appeals according to its own rules and methods of procedure so far as practicable and shall decide all questions both as to the legality of the assessment and the amount thereof. * * *

Act of July 2, 1940, Pub., No. 703, 76th Cong., 3d Sess., c. 508:

SEC. 1. (a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may

deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

**Military Appropriation Act, 1941, Public No. 611,
76th Congress, 3d Sess., c. 343:**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1941, and for other purposes, namely: * * * * **

MILITARY POSTS

** * * * * emergency construction, \$47,-
976,962, including the acquisition of neces-
sary land therefor, without regard to the pro-
visions of sections 355 and 1136, Revised
Statutes, as amended (10 U. S. C. 1339; 40
U. S. C. 255); * * * * **